RECORD
AND
BRIEFS

Nos. 09-958, -1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *Respondent*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, ET AL., *Petitioners*,
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL., *Respondents*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,
v.
SANTA ROSA MEMORIAL HOSPITAL, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Chamber's members depend on the robust enforcement of conflict preemption principles as protection against state and local mandates that interfere or conflict with requirements imposed by federal law. The Supremacy Clause of the Constitution, which is the fountainhead of the doctrine of conflict preemption,

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under this Court's Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

serves a vital structural role in our Nation's government and economy by (a) protecting all federal laws and programs against interference by subordinate governments; and (b) eliminating regulatory burdens placed on the formation and operation of unified national markets for goods and services. Those crucial societal benefits depend on the availability of effective means for injured businesses and other litigants to enforce the Supremacy Clause in the courts—the primary institutions to which the Framers assigned this important responsibility. In this case, petitioners seek to weaken or eliminate a significant, time-tested method for such enforcement: the cause of action for equitable relief under the Supremacy Clause.

The Chamber has relied on this cause of action in seeking to vindicate the interests of its members. See, *e.g.*, *Chamber of Commerce of the United States* v. *Whiting*, 131 S. Ct. 1968 (2011); *Chamber of Commerce of the United States* v. *Brown*, 554 U.S. 60 (2008). When not acting as a party, the Chamber has frequently supported such suits as an *amicus curiae*. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court correctly resolves the important issue presented here.

STATEMENT

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2. The question presented by this case is whether the Supremacy Clause furnishes a cause of action for injunctive relief against state enactments that are preempted by federal law.

The federal statute involved here is the Federal Medicaid Act, which sets out "a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). States that choose to accept federal funding must comply with certain requirements set out in the statute, as well as in regulations promulgated by the Secretary of Health and Human Services. California has accepted funding and is therefore bound by those requirements in administering the State's Medicaid program (known as "Medi-Cal").

In a series of lawsuits, various entities and individuals—including hospitals, pharmacies, pharmacists, adult day health centers, and individual Medicaid recipients—challenged several California statutes, each of which reduced Medicaid payment rates. The plaintiffs (respondents here) argued that, by ordering further successive reductions in California payment rates that *were already the lowest*

in the Nation on an average per-enrollee basis, the California statutes violated Section 30(A) of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). Section 30(A) provides, in relevant part, that States must take certain steps to "assure that payments" are not only "consistent with efficiency, economy, and quality of care" but also "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." In each of the cases, the district court ultimately entered a preliminary injunction against the challenged rate reduction, and the Ninth Circuit affirmed.

The two basic questions facing the Ninth Circuit were (1) whether the Supremacy Clause provided a cause of action for the respondents—Medicaid providers and recipients who face injury from the rate reductions—to seek injunctive relief on preemption grounds; and (2) whether the challenged California statutes imposing the rate reductions were in conflict with, and thus preempted by, the Medicaid Act. The Ninth Circuit answered both questions in the affirmative. This Court granted certiorari with respect to only the first question. As this case comes to the Court, then, it is undisputed that the challenged California statutes violate or directly conflict with Section 30(A) of the Medicaid Act.

SUMMARY OF ARGUMENT

The question presented is whether this Court should foreclose (or at least sharply curtail) an avenue of relief that has long been available: namely, a cause of action for equitable relief against preempted state laws. The Court should adhere to its

historical practice and continue to recognize the preemption cause of action. Furthermore, it should hold explicitly that this cause of action arises under the Supremacy Clause.

I. This conclusion is dictated by this Court's longstanding and consistent practice over almost 200 years. The Court has specifically held that there is federal jurisdiction over preemption claims. Moreover, the Court has routinely proceeded directly to the merits of such claims, frequently granting relief to plaintiffs requesting injunctive relief against preempted state or local laws without doubting that there was a valid cause of action. These decisions firmly establish the general availability of a private cause of action for prospective relief on preemption grounds.

Multiple lower courts and commentators have correctly recognized that this cause of action is rooted in the Supremacy Clause. This Court has also recognized the nexus, explaining that "the availability of prospective relief . . . gives life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

Petitioners mistakenly seek to impair that vitality by confining this cause of action to the parameters of the Court's Section 1983 and implied-cause-of-action jurisprudence. They cannot account, however, for the Court's different approach to preemption cases. Instead of applying the analytical frameworks it has developed in the Section 1983 and implied-cause-of-action contexts, the Court in preemption cases proceeds directly to the merits. This longstanding and consistent approach is justified, as the preemption

cause of action is different from these points of comparison in several crucial respects.

II. The history of the Supremacy Clause demonstrates that the Framers entrusted enforcement of federal supremacy to the courts, and that they regarded the Supremacy Clause as the effective means of accomplishing that objective. The Supremacy Clause was adopted to prevent States from flouting federal law. It was chosen over two alternatives—one that would have placed the responsibility for ensuring federal supremacy on the Executive Branch (by authorizing the Union to coerce noncompliant States with military force), and another that would have relied on affirmative action by Congress (by giving it a "negative" over state law). The Supremacy Clause was ultimately chosen because it was viewed as an adequate substitute for the Congressional negative; in other words, it was a potent, affirmative guarantee of federal supremacy, to be implemented by the courts. In recognizing the preemption cause of action, this Court is ensuring that the judiciary will continue to perform the role assigned to it by the Supremacy Clause.

Furthermore, this cause of action remains vitally important as a safeguard against widespread flouting of federal law by state and local governments. If credited, the petitioners' position would undermine the effectiveness of federal preemption. That, in turn, would harm businesses and consumers by undercutting the crucial systemic benefits of preemption, which include the promotion of regulatory uniformity, the flourishing of a unified national marketplace, and the enablement of national deregulatory policies.

III. Petitioners say that a cause of action should not be available in this case because the challenged California statutes do not directly regulate the respondents' conduct. Such a requirement would add little, however, because standing rules already ensure that only appropriate plaintiffs may bring preemption actions. Moreover, this limitation makes no sense because it would require courts to treat direct and indirect regulations differently even if they have the identical effect on the plaintiffs and are equally preempted. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (rejecting analysis that would "further complicat[e] well-established pre-emption principles that already are difficult to apply").

Finally, the petitioners argue that the Supremacy Clause cause of action should be unavailable with respect to Spending Clause statutes, because such statutes resemble contracts more than ordinary legislation. That is squarely at odds with the Court's cases, which treat Spending Clause statutes as having fully preemptive force. Moreover, that contention is simply a preemption argument on the merits, rather than an argument concerning the existence of a cause of action. As such, it is irrelevant in this case.

ARGUMENT

The central issue in this case is whether this Court should decline to recognize an equitable right of action under the Supremacy Clause to enjoin California officials from implementing and enforcing state laws that violate or directly conflict with a provision of the Federal Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). Petitioners and their *amici*

correctly acknowledge that this Court's cases recognize a federal equitable cause of action to enjoin state laws preempted under the Supremacy Clause, at least in certain circumstances. See Brief of National Governors Ass'n et al., at 23-24 (recognizing "a right in equity to assert an anticipatory defense against the enforcement of a pre-empted State law") ("NGA Br."); Pet. Br. 43-44 & n.15 (same; recognizing as well that "the federal government may sue to enjoin state law that purportedly is preempted by federal law"); U.S. Br. 21 & n.7. For its part, the United States further acknowledges that this cause of action has "considerable historical grounding," is "well established," and "serves an important purpose in vindicating the supremacy of federal law." U.S. Br. 21 n.7.

Despite these concessions, petitioners and their *amici* repeatedly seek to cast doubt upon a line of this Court's cases that, as respondents demonstrate, extends back almost 200 years. See Brief of Respondents Santa Rosa Memorial Hospital et al., at 18-26 ("Santa Rosa Resp. Br."); Brief of Intervenor Respondents in No. 09-958 and *California Pharmacists* Respondents in No. 09-1158, at 20-31 ("*California Pharmacists* and Intervenor Resp. Br."); Brief for *Dominguez* Respondents in Case No. 09-1158, at 7-11 & App. 1a-11a (listing 61 decisions of this Court) ("*Dominguez* Resp. Br."). Petitioners' principal contention is that this cause of action should not be available when the preemption arises from a statute enacted under the federal Spending Clause.

This Court should reject that departure from longstanding practice. Proper resolution of this

question turns on the nature of the Supremacy Clause, not the particular statute at issue. The Supremacy Clause was intended as an affirmative guarantee that national law will be effective in displacing inconsistent state and local regulation. And it is undisputed that responsibility for enforcing that guarantee was vested in the judiciary; indeed, petitioners and their *amici* acknowledge that the Framers rejected alternative proposals that would have required Congress to serve as the arbiter of federal supremacy. Pet. Br. 38; NGA Br. 4, 14-16. And yet that is precisely what petitioners and their *amici* now urge in claiming that there is no cause of action under the Supremacy Clause (in this statutory context, at least)—if Congress does not affirmatively supply a *statutory* right of action, they say, then the *constitutional* guarantee of federal supremacy is merely hypothetical. But the Supremacy Clause flatly declares that federal law "*shall* be the supreme Law of the Land," U.S. CONST., art. VI, cl. 2 (emphasis added), not that it "ought" to be supreme if Congress so provides.

I. THIS COURT SHOULD UNAMBIGUOUSLY HOLD THAT A CAUSE OF ACTION EXISTS UNDER THE SUPREMACY CLAUSE FOR INJUNCTIVE RELIEF AGAINST PRE-EMPTED STATE LAWS

A. This Court's Decisions And Longstanding Practice Already Establish This Cause Of Action

Almost thirty years ago, in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court addressed the question of federal jurisdiction over preemption claims. The Court explained that "[a] plaintiff who

seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." 463 U.S. at 96 n.14. That conclusion, which was emphatically reiterated in *Verizon Maryland Inc.* v. *Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002), is rooted in a long line of authority stretching back at least to the seminal opinion in *Ex parte Young*, 209 U.S. 123 (1908). As a leading treatise observes: "The entire line of cases beginning with *Ex parte Young* establishes that in many circumstances a person confronted with efforts to apply state law may invoke federal question jurisdiction to restrain state officials on the ground of unconstitutionality of a state enactment. The version of unconstitutionality that arises from the preemptive effect the Supremacy Clause gives to federal statutes would seem to be no different." 13D C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 3566, at 288 (3d ed. 2008) (footnotes omitted) ("WRIGHT & A. MILLER"); see also *Shaw*, 463 U.S. at 96 n.14 (citing *Ex parte Young*).

To be sure, the issue of subject matter jurisdiction may be distinguished from the cause-of-action inquiry. *Verizon*, 535 U.S. at 642-43. But it is noteworthy that in *Shaw*, where a group of employers claimed that two New York statutes were preempted by federal law, the Court proceeded directly to the merits, without ever questioning whether there was a valid cause of action. *Shaw*, 463 U.S. at 95-96. Indeed, the Court granted relief to the employers, holding that one of the statutes was at least partially preempted. *Id.* at 108-09. In so doing, the Court

unmistakably indicated that the employers had a valid cause of action.

Moreover, as respondents persuasively demonstrate, *Shaw* is part of a long line of cases in which the Court has allowed private parties to seek prospective relief against state officials on pre-emption grounds. See Santa Rosa Resp. Br. 18-26; *California Pharmacists* and Intervenor Resp. Br. 20-31; *Dominguez* Resp. Br. 7-11 & App. 1a-11a (listing 61 decisions of this Court). Even the United States, in siding with petitioners, is constrained to admit that this Court has "decided *dozens* of preemption claims against state officials on their merits in cases brought in federal court." U.S. Br. 9 (emphasis added). As respondents persuasively demonstrate, this line of cases in fact stretches back almost 200 years, to the Court's decision in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See Santa Rosa Resp. Br. 18-19 (discussing *Osborn*); *California Pharmacists* and Intervenor Resp. Br. 20-21 (same); *Dominguez* Resp. Br. 7-8 (discussing *Osborn* and other early cases).[2]

In short, through its decisions and consistent practice over almost 200 years, this Court has made clear that there is a generally available cause of action for parties who seek to enjoin state action on the ground that it is preempted. See R. FALLON, JR.,

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[2] Recent examples include *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (Maine tobacco law), *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (Michigan banking regulations), and *Arkansas Dep't of Health & Human Services* v. *Ahlborn*, 547 U.S. 268 (2006) (Arkansas law governing liens asserted against tort settlements by Medicaid recipients). Earlier examples could be effortlessly multiplied. See *Dominguez* Resp. Br. App. 1a-11a (collecting cases).

J. MANNING, D. MELTZER, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 807 (6th ed. 2009) (describing as "well-established" the "rule" that a cause of action exists "to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within the federal question jurisdiction") ("HART AND WECHSLER"). Unsurprisingly, the lower courts have uniformly followed suit and recognized such a cause of action. See *Indep. Living Ctr. of S. California, Inc.* v. *Shewry*, 543 F.3d 1050, 1058-59 (9th Cir. 2008) (collecting cases).

Although this Court has not explicitly identified the precise source of this cause of action, many lower courts and commentators have correctly concluded that it arises under the Supremacy Clause. As the Wright & Miller treatise notes, this is "[t]he best explanation of *Ex parte Young* and its progeny." 13D WRIGHT & MILLER, *supra*, § 3566, at 292. At least five circuits have adopted this view. See *Planned Parenthood of Houston and Southeast Tex.* v. *Sanchez*, 403 F.3d 324, 334 & n.47 (5th Cir. 2005); *Pharm. Research & Mfrs. of Am.* v. *Concannon*, 249 F.3d 66, 73 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc.* v. *Gov't of U.S. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000); *Farricielli* v. *Holbrook*, 215 F.3d 241, 245 (2d Cir. 2000); *Guar. Nat'l Ins. Co.* v. *Gates*, 916 F.2d 508, 511-512 (9th Cir. 1990).

That widespread understanding of the Court's case law and settled practice make perfect sense in light of the Court's observation, in *Green*, 474 U.S. at

68, that "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." In *Green*, the Court went on to explain that "[r]emedies designed to end a continuing violation of federal law are *necessary* to vindicate the federal interest in assuring the supremacy of that law." *Ibid.* (emphasis added). In other words, the Supremacy Clause loses meaning if prospective relief is unavailable to effectuate it. It therefore stands to reason that the cause of action for prospective relief is rooted in the Supremacy Clause itself.

B. The Court Should Reject Petitioners' Efforts To Sow Doubt About, And To Limit, This Important Cause Of Action Based On Inapposite Case Law Involving Either Section 1983 Or Implied Rights Of Action Under Federal Statutes

In an effort to call into question a cause of action that is "well-established" under this Court's cases (HART AND WECHSLER, *supra*, at 807), petitioners advance various arguments. All are meritless.

First, petitioners seize on a single sentence from *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989), where the Court stated that the Supremacy Clause "is not a source of any federal rights" (internal quotation marks omitted). Pet. Br. 35. But that quotation—viewed in context—merely clarifies that the Supremacy Clause does not create federal rights under 42 U.S.C. § 1983. See *Golden State Transit Corp.*, 493 U.S. at 107 (agreeing with the proposition that "the Supremacy Clause, of its own force, does not create rights *enforceable under § 1983*" (footnote omitted, emphasis added)). In any event, the quotation is beside the point. Even if the

Supremacy Clause does not create "rights," it does create a "federal interest in assuring the supremacy of [federal] law." *Green*, 474 U.S. at 68. That interest can be effectively vindicated only through the sort of prospective relief that the Court has consistently made available in cases like this.[3]

Equally unavailing is petitioners' argument that no cause of action should be recognized in this case because the Federal Medicaid Act itself neither contains an implied cause of action nor gives rise to a cause of action under Section 1983. Pet. Br. 22-26. Contrary to petitioners' submission, this Court's preemption decisions cannot be confined to the boundaries of the Court's Section 1983 and implied-cause-of-action jurisprudence.

This Court approaches preemption cases differently from cases involving enforceable "rights" under Section 1983 and implied rights of action under federal statutes. As noted above, instead of applying the frameworks it has developed for analyzing implied statutory causes of action and Section 1983 claims, see *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 282 (2002), the Court simply proceeds to the merits in preemption cases. See, *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 540 (2001); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Foster* v. *Love*, 522 U.S. 67, 70-72 (1997); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992). Moreover, if the Court *had* applied those tests, in

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[3] While the Supremacy Clause is the most plausible source of the preemption cause of action, other possibilities do exist. For instance, the United States suggests that it may be rooted "in the courts' historical exercise of equitable powers." U.S. Br. 20.

many preemption cases it would have found no cause of action. See David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 391-98 (2004) (demonstrating that the federal statutes at issue in *Lorillard* and *Crosby* did not create express, implied, or Section 1983 causes of action). Nevertheless, the Court routinely decides such cases on the merits, making it clear that the *Cort* and *Gonzaga* tests are simply inapposite.

This approach is entirely justified. The preemption context is different in several crucial respects from the *Cort* and *Gonzaga* contexts, making different treatment not just rational but imperative. For starters, the *Cort* and *Gonzaga* lines of cases concern statutory causes of action (and, typically, efforts to secure retrospective relief in the form of compensatory or punitive damages). In that setting, the Court was understandably deferential to Congress in defining the precise contours of any available remedy. See *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979) (noting that "[t]he question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction"). By contrast, the Supremacy Clause cause of action vindicates the Constitutional interest in the supremacy of federal law in the face of conflicting state action; therefore, it is entirely appropriate for the judiciary to take a more prominent role in fashioning it. See also Santa Rosa Resp. Br. 22-26 (discussing the Court's decisions recognizing claims arising directly under various other provisions of the Constitution without need of statutory authorization).

Moreover, Section 1983 is targeted at a different class of violations and provides a different set of remedies. Unlike the Supremacy Clause cause of action, which is limited to injunctive relief, Section 1983 allows for monetary damages. As a consequence, the former is necessarily targeted at ongoing or recurring violations, while the latter has no such limitation. The two mechanisms, therefore, have quite different functions: The Supremacy Clause cause of action operates to prevent systemic violations of federal law, while Section 1983 redresses individual injuries in appropriate circumstances. See Sloss, *supra*, at 413-15.

Finally, it should be noted that the Court's consistent concern with Congressional intent in the statutory right of action context, see *Cort*, 422 U.S. at 78, *Gonzaga*, 536 U.S. at 280, actually militates *in favor* of the Supremacy Clause cause of action. Because the Court has consistently allowed private parties to sue for injunctive relief against state officers without a finding that the statute contains a cause of action, Congress has had no reason to provide for such lawsuits explicitly. See *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 252, 260 (1992) (Congress is presumptively aware of settled backdrop of existing law). Far from effectuating congressional intent, petitioners' position would frustrate Congress's reliance on this well-established legal regime.

II. THIS COURT'S ESTABLISHED APPROACH FINDS SUPPORT IN THE HISTORY OF THE SUPREMACY CLAUSE AND IS NECESSARY TO EFFECTUATE ITS PURPOSE AND TO BRING ABOUT THE SIGNIFICANT BENEFITS OF THE PREEMPTION DOCTRINE

The Court's recognition of a cause of action for prospective relief under the Supremacy Clause is entirely consistent with the Clause's original meaning. A review of the history surrounding its adoption reveals two crucial principles: (1) the Framers entrusted the enforcement of federal supremacy to the courts; and (2) they regarded the Supremacy Clause as the means of effectively accomplishing that objective. A state of affairs where federal supremacy is flouted without recourse is repugnant to the Supremacy Clause. The cause of action for preemption actions is therefore essential.

A. The Framers Assigned The Principal Responsibility To Enforce Federal Supremacy To The Courts Rather Than To Congress

The Supremacy Clause was intended to address glaring shortcomings in the Articles of Confederation. See *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979) (the Framers believed that "to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations . . . among the States under the Articles of Confederation"). One legal scholar has aptly summarized the shortcomings of the Articles of Confederation:

> In the absence of something like the Supremacy Clause, state courts might have sought to analo-

> gize federal statutes to the laws of a foreign sovereign, which they could ignore under principles of international law. . . . [Moreover,] [t]he Articles had not been ratified by conventions of the people in each state; states had manifested their assent merely by passing ordinary statutes authorizing their delegates to sign the Articles . . . . James Madison fretted that as a result, "whenever a law of a State happens to be repugnant to an act of Congress," it "will be at least questionable" which law should take priority
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> . . . .

Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 247-48, 251 (2000) (quoting James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 PAPERS OF JAMES MADISON 345, 352 (R. Rutland & W. Rachal eds. 1975)).

To address these structural deficiencies in the Articles, the Framers included the Supremacy Clause, which broadly provides that "the Laws of the United States . . . *shall* be the supreme Law of the Land . . . *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*" U.S. CONST., art. VI, cl. 2 (emphasis added). By its terms, the Supremacy Clause makes all federal laws automatically preemptive of state and local laws to the extent that the latter impose conflicting obligations or requirements. It declares that federal law "shall" be supreme, not that it "may" displace inconsistent state and local regimes—that is, it states an affirmative constitutional guarantee that federal law will control; it is not a statement that federal law has the mere potential to trump in case of conflict.

That affirmative guarantee reflects a deliberate choice by the Framers. During the Constitutional Convention, the Founders considered "three mechanisms for resolving conflicts between federal and state law." Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1348 (2001). Compare NGA Br. 14-19 (discussing only two of the three mechanisms). Significantly for present purposes, each of the three proposed mechanisms relied on different institutions of government to enforce the principle of federal supremacy, each with markedly different consequences for what the Clause would accomplish in practice.

First, the Virginia (or Large State) Plan proposed "authorizing the Union to use military force to coerce the states to comply with federal law." Bradford Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 325 (2003). This plan would have placed authority in the hands of the Executive Branch. But "[t]he delegates were immediately opposed to the use of force" and "[t]he Convention tabled the proposal and never seriously entertained this alternative." *Id.* at 325-26 & nn.44-47.

Second, the Virginia Plan alternatively recommended "that the National Legislature ought to be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." Madison, *Notes on the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand, ed. 1911) ("FARRAND'S RECORDS"). Under this "congressional negative" as originally proposed, Congress alone

would have had the power to "negative" all state laws that, in Congress's judgment, violated the federal Constitution. Importantly, the delegates apparently envisioned the congressional negative (by analogy to the Crown's prerogative to approve Colonial laws) as operating to *prevent* state laws from going into effect *until* Congress acted (except in special circumstances). Indeed, James Madison argued that anything other than this powerful congressional negative would be ineffective because it would allow the States to "pass laws which will accomplish their injurious objects before they can be repealed" by Congress or invalidated by the federal courts. 2 FARRAND'S RECORDS 27.

Third, the New Jersey Plan included a resolution that "was in substance and concept, if not in form, similar to the current language of the Supremacy Clause." Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2089 (2000). It "would have required state courts (subject to federal appellate review) to enforce the Laws of the United States . . . as 'the supreme law of the respective States.'" Clark, *supra*, 72 GEO. WASH. L. REV. at 327 (quoting 1 FARRAND'S RECORDS 245).

The Convention initially approved the "congressional negative" in its original form. *Id.* at 326. But Charles Pinckney "moved to expand the negative" by giving Congress the power to negate any state law that Congress regarded as "improper" (rather than merely contrary to the federal Constitution). At that point, the small-State delegates strongly objected, and the Convention not only rejected Pinckney's proposal but also "subsequently reconsidered and rejected even the original

congressional negative." *Ibid.* The congressional negative was unacceptable to a majority of States because it "would have allowed *Congress* to determine for itself the scope of its powers vis-à-vis the states." *Ibid.* (emphasis added).

"[T]he Convention subsequently adopted the Clause immediately after rejecting the congressional negative." *Id.* at 327. In so doing, the Convention rejected the arguments of James Madison (who had been the primary drafter of the Virginia Plan) that adoption of the congressional negative was "essential to the efficacy & security of the Genl. Govt." 2 FARRAND'S RECORDS 27. Disagreeing with Madison, Gouverneur Morris explained that any "law that ought to be negatived *will be set aside in the Judiciary departmt.* and if that security should fail; may be repealed by a Nationl. law." *Id.* at 28 (emphasis added). Similarly, Roger Sherman argued that the congressional negative was "unnecessary" because the state courts "would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived." *Id.* at 27.

All of this makes clear that the Convention delegates who opposed the congressional negative did so because, among other things, they viewed it as unnecessary once the Supremacy Clause had been included in the Constitution. In other words, the Supremacy Clause was viewed as an *adequate means* of addressing the problem the congressional negative was meant to solve—namely, the possibility that States would flout federal law. See *The Federalist No. 15* (Hamilton) (noting that "*in practice* [the resolutions of the Continental Congress] are mere

recommendations which the States observe or disregard at their option" (emphasis added)). The Supremacy Clause was not understood as a mere aspiration, but rather as an affirmative guarantee that would accomplish this defining objective of the constitutional scheme.

Furthermore, the Supremacy Clause *assigned to the courts* in the first instance the duty to ensure that state laws that were inconsistent with federal laws would be accorded no effect (and thus preempted). Indeed, the specific language of the Supremacy Clause confirms the Framers' intent that it be enforced by the Judiciary. See U.S. CONST., art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The first clause establishes a hierarchy of federal law and authority; the second is expressly directed at "Judges."

As for the third clause—"any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"—scholarship has established that its form would have been understood by the Framers (and late-Eighteenth-Century judges) as a so-called "*non obstante*" clause. Such clauses were specifically *directed at courts* and understood as a directive concerning the rules of interpretation to apply to federal statutes alleged to conflict with state law. See Nelson, *supra*, 86 VA. L. REV. at 232, 235-44, 291-303. The *non obstante* form of the Supremacy Clause, then, confirms the Framers' plan to vest responsibility for interpreting and enforcing the

Supremacy Clause in the judiciary. *Id.* at 232, 245-64.

In short, the Framers expected the Supremacy Clause to prevent widespread defiance of federal law, and they expected the courts to have primary institutional responsibility for effectuating that result. As respondents demonstrate, this expectation was amply justified by the contemporary practice of suits in equity to restrain officials from unauthorized actions. *Dominguez* Resp. Br. 11-17. In allowing a cause of action for prospective relief on the grounds of preemption, this Court is simply facilitating and performing the role assigned to the judiciary by the Supremacy Clause—namely, preventing systematic violations of federal law by state officials.

While petitioners and their *amici* acknowledge that the Framers vested this responsibility in the judiciary—and specifically rejected the congressional negative proposal—they fail to apprehend the perverse consequence that rejecting a cause of action for preemption would have. In the absence of such a cause of action, asserting federal supremacy *would require congressional action*. As illustrated by this case (and the numerous examples detailed above), there are numerous instances in which federal law conflicts with state law but does not provide a statutory cause of action or an individual "right" within the ambit of 42 U.S.C. § 1983. Petitioners would require Congress to take affirmative action to supply a means to assert federal supremacy, by creating (or, in the case of § 1983, triggering) a cause of action. Petitioners would, in short, require action by the very institution (Congress) that the Framers passed over before the courts could discharge their

assigned duties under the Supremacy Clause. That is exactly backward.[4]

Indeed, many statutes do not expressly provide for a private cause of action, and this Court has been appropriately cautious in finding implied causes of action and allowing statutory claims to be brought under Section 1983. See *Cort*, 422 U.S. at 78; *Gonzaga Univ.*, 536 U.S. at 282. As noted above, these statutory causes of action are necessarily circumscribed by congressional intent. See *Davis* v. *Passman*, 442 U.S. 228, 240-41 (1979) (noting that "it is entirely appropriate" for Congress to determine who may enforce statutes, and drawing a contrast with the Constitution, where "the judiciary is clearly discernible as the primary means" of enforcement). This makes the statutory causes of action poorly suited, however, to vindicate the Constitutional interest in federal supremacy.

B. Petitioners' Rule Would Harm Businesses And Consumers And Undermine The Significant Benefits Flowing From The Preemption Doctrine

Preemption is a pervasive and highly beneficial feature of our system of government. By virtue of the Supremacy Clause and the doctrine of preemption that flows directly from it, state and local governments may not impose requirements that conflict with federal law. Both Congress and regulatory agencies also rely on preemption as a

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[4] Relying on the Executive Branch to enforce the Supremacy Clause (see Pet. Br. 44 n.15) similarly ignores the history of the Supremacy Clause and the institutional choices made by the Framers.

crucial tool in reducing or eliminating the burdens that flow from multifarious (and even conflicting) legal and regulatory requirements imposed by 50 States and thousands of municipal and local governments. In significantly limiting the effectiveness of federal preemption, petitioners' position would undermine three crucial benefits that flow from an effective preemption regime: (1) promotion of regulatory uniformity; (2) promotion of a unified national marketplace for goods and services; and (3) enablement of national deregulatory policies. These benefits reach far beyond the statutory scheme at issue here.

1. *Regulatory uniformity.* Without the protection of preemptive federal laws, companies may be subject to inconsistent and indeed incompatible regulation by thousands of state, municipal, and local entities. Not surprisingly, Congress has repeatedly invoked the benefits of regulatory "uniformity" in enacting preemption provisions in a variety of settings—especially with regard to nationally distributed products. See, *e.g.*, Federal Railroad Safety Act, 49 U.S.C. § 20106(a)(1) ("Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.").

The principal advantages flowing from regulatory uniformity are economic efficiencies in the manufacturing and distribution processes. As one commentator has explained in describing the origins of the preemption clause of the Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343-1, "[p]reparing different labeling, advertising, and food formulations for different states is costly" and "[i]nconsistent labeling laws can slow food manufacturing and

distribution, raise prices, and confuse consumers confronted with different information and warnings." Michele Bradley, *The States' Role in Regulating Food Labeling and Advertising: The Effect of the Nutrition Labeling and Education Act of 1990*, 49 FOOD & DRUG L.J. 649, 653 (1994). Modern manufacturing processes and distribution networks must be altered, and invariably are made less efficient, to account for regulatory variations in the markets for which the products are bound. This is further complicated where the products themselves are mobile and apt to be used in multiple jurisdictions. As a general matter, then, regulatory uniformity has the effect of decreasing the costs of production, distribution, and regulatory compliance, and thus has the potential to lower the price of goods and services for consumers.

2. *Promotion of a unified national market.* In certain cases the costs of complying with a welter of diverse or inconsistent regulatory requirements become so large that manufacturers may elect either not to serve particular markets at all or to "conform" their products "with the most restrictive applicable law." Bradley, 49 FOOD & DRUG L.J. at 654.[5] In the

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[5] Commentators have recognized the possibility of this occurring as a result of modern product liability litigation. Thus, as Professor Michael McConnell has explained: "[S]tate-by-state determination of the law of products liability seems to have created a liability monster. This is because each state can benefit in-state plaintiffs by more generous liability rules, the costs being exported to largely out-of-state defendants; while no state can do much to protect its in-state manufacturers from suits by plaintiffs in the other states. Thus, competition among the states in this arena leads to one-sidedly pro-plaintiff rules of law." Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1499 (1987); see also Michael McConnell, *A Choice-of-Law Approach to Products-Liability*

latter scenario, the net result is that "[s]tate enforcement activities" in several or even in a single jurisdiction can have the extraterritorial effect of "regulat[ing] . . . manufacturers nationally." *Ibid.*

In enacting many preemption clauses, Congress appears to have acted out of a concern over the potential burdens imposed on the national market—and on interstate commerce—by divergent state and local regulations. Thus, Congress has allowed for limited waivers or exemptions from express preemption schemes where state or local laws that do "not unreasonably burden interstate commerce." Federal Railroad Safety Act, 49 U.S.C. § 20106(a)(2)(C); see also Hazardous Materials Transportation Act, 49 U.S.C. § 5125(e)(2); Consumer Product Safety Act, 15 U.S.C. § 2075(c)(2). The desire to protect interstate commerce against disparate state rules also undergirds various preemption clauses enacted by Congress to regulate the channels and instrumentalities of interstate commerce (such as trains, airplanes, trucks, boats, and cars). See, *e.g.*, Safety Appliance Acts, 49 U.S.C. §§ 20301-20306; Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703.

Preemption of divergent and potentially conflicting state and local requirements thus plays an important role in ensuring and protecting the development of a unified national marketplace for goods and services. Indeed, only through preemption by the federal government may the problem of

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Reform, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olson ed., 1988) (discussing the reasons why "the cost of a given state's liability laws, as they apply to mass-marketed products, is borne by consumers nationwide").

incompatible state and local commands be effectively addressed and remedied.

3. *Deregulation.* Whenever the federal government wishes to pursue a deregulatory approach to some area of the economy, the federal power to legislate *preemptively* is critically important. Without such authority, a nationwide program of deregulation will fall flat (except in the unlikely event that there is nationwide unanimity). Accordingly, this Court has recognized that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Electric Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983). This Court has applied that principle in various settings. See, *e.g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (holding preempted Washington state ban on large oil tankers in Puget Sound).

Moreover, Congress has repeatedly decreed this type of preemption under the federal labor laws. See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.") (internal quotation marks omitted); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774 (1947) (preemption occurs "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such

regulation is appropriate or approved pursuant to the policy of the [federal labor] statute").

Congress has also relied on this rationale in enacting preemption provisions that target certain modes of transportation. For example, the aptly-named Airline Deregulation Act of 1978 (ADA), which regulates air carriers (49 U.S.C. § 41713(b)), preempts state laws that regulate "price[s], route[s], or service." See *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992). In enacting that statute, "Congress' overarching goal" was to "help[] assure transportation rates, routes and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). Congress has taken similar steps in deregulating the trucking industry. See *id.* at 367-68.

In sum, a well-functioning preemption regime is crucially important to businesses and consumers. By preventing widespread disregard of federal law by state officials, the Supremacy Clause cause of action vindicates the Constitutional interest in federal supremacy while also securing the considerable benefits of uniform regulation, integrated markets, and effective deregulation.

III. PETITIONERS' ATTEMPTS TO NARROW THE CAUSE OF ACTION UNDER THE SUPREMACY CLAUSE TO EXCLUDE THIS CASE IMPROPERLY IMPORT CONCERNS THAT ARE NOT GROUNDED IN THE SUPREMACY CLAUSE, AND ARE APPROPRIATELY ADDRESSED BY STANDING RULES AND THE SUBSTANTIVE LAW OF PREEMPTION

A. The Supremacy Clause Does Not Support Petitioners' Proposed Limitation, And Standing Rules Ensure That Preemption Lawsuits Are Brought, As Here, Only By Appropriate Plaintiffs

Faced with the reality that this Court routinely entertains preemption challenges by private parties, petitioners and the United States struggle to limit this line of authority in a way that would exclude the present case. In addition to relying on inapposite lines of cases involving Section 1983 and statutory rights of action (see pages 13-16, *supra*), they contend that, if the pertinent federal statute does not specifically confer "rights" on private parties, then a cause of action should be allowed only when preemption is used "solely as a defense to state regulation of a defendant's (or putative defendant's) conduct." Pet. Br. 44; see also U.S. Br. 22 (arguing that the challenged regulations "do not regulate respondents' primary conduct"). This restriction is not grounded in the Supremacy Clause, and, in any event, it is both unnecessary and inconsistent with the Court's approach to preemption cases.

For starters, petitioners and the United States provide virtually no support for this "primary

conduct" test, presumably because neither the text nor the purpose of the Supremacy Clause admits of such a limitation. By its terms, the Supremacy Clause makes *all* federal law supreme—there is no suggestion that only "federal affirmative rights" or "federal defenses" have such force. The absence of such a textual distinction is fully consistent with the clause's purpose, which was to guarantee the priority of federal law across the board. See *supra* pp. 17-23. Nothing in the Supremacy Clause itself suggests that federal law only "sometimes" trumps inconsistent state and local regimes.

Underlying petitioners' proposed restriction is the notion that such a test would somehow serve to restrict the cause of action to an appropriate set of plaintiffs. This function, however, is already performed by standing doctrine. See *Indep. Living Ctr. of S. California, Inc.*, 543 F.3d at 1057 (noting that a similar argument made by the district court appeared simply to "reflect traditional standing doctrine"). The three "irreducible constitutional minimum" elements of standing—injury in fact, causation, and redressability—already enforce appropriate limits on those who may assert a constitutional interest in a preemption action. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-103 (1998) (internal quotation marks omitted).

In preemption cases, the injury-in-fact and causation requirements ensure that suit can be brought only by plaintiffs who have suffered a concrete injury (such as the reductions in payments suffered by respondents in these cases) that is fairly traceable to the defendants' enforcement of allegedly preempted laws (such as petitioners' enforcement of

California's rate reductions). Importantly, because the Supremacy Clause cause of action is for prospective relief (not retrospective relief such as damages), plaintiffs can demonstrate redressability only if their injury is either ongoing or likely to recur. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). This also tends to restrict preemption lawsuits to cases like this one, where the plaintiffs are (or, in the absence of injunctive relief, will be) repeatedly and systematically injured by government action they claim is in violation of federal law.

There is simply no indication that the Court intended to restrict the class of potential preemption plaintiffs any further than this. For example, there is no reason to believe that when *Shaw* speaks of "plaintiff[s] who seek[] injunctive relief from state regulation," it means to import a "primary conduct" restriction that would exclude the respondents here, who will suffer enormous financial losses and may ultimately be forced to limit the availability of crucial health services to beneficiaries. See *Golden State Transit Corp.*, 493 U.S. at 114 (Kennedy, J., dissenting) (explaining that an "*injured party* does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system" (emphasis added)).

This Court's recent decision in *Rowe* is a particularly vivid illustration of the illogic of petitioners' position. The plaintiffs there were transport carrier associations. They argued that two provisions of Maine tobacco law were invalidated by the Federal Aviation Administration Authorization Act of 1994, which preempted state trucking

regulations. 552 U.S. at 367-68. One of these provisions regulated carriers directly, by restricting transport of tobacco into Maine. *Id.* at 369, 372. The Court held that it was preempted. *Id.* at 373. The second provision, however, did not directly regulate trucking; instead, it directed the state's tobacco *retailers* to employ only those delivery services that followed certain provisions. *Id.* at 372. The Court took note of this distinction: "We concede that the regulation here is less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers* what to do." *Ibid.* The Court went on, however, to explain the distinction was without a difference: "Nonetheless, the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate. And that being so, treating sales restrictions and purchase restrictions differently for pre-emption purposes would *make no sense*." *Ibid.* (emphasis added, internal quotation marks omitted).

In other words, the direct and indirect regulations were identical for preemption purposes, and there was no reason to treat them differently. But according to the petitioners, courts *must* treat them differently for purposes of defining the preemption *cause of action*. In petitioners' world, the truckers in *Rowe* would have had a cause of action with respect to one provision but not the other, equally preempted provision. That makes no sense: Indirect regulation can be just as injurious to affected parties and just as inimical to federal supremacy as direct regulation. Accordingly, there is no justification for exempting indirect regulation from preemption lawsuits.

B. Whether Spending Clause Legislation Should Be Treated Differently Is A Question Of Preemption Doctrine

Petitioners' final effort at restricting the scope of the Supremacy Clause cause of action is their contention that the cause of action disappears in the Spending Clause context. See Pet. Br. 46. In particular, petitioners maintain that, because Spending Clause legislation resembles a contract, any remedy for noncompliance must be supplied by the "terms of the . . . contract." *Id.* at 47. This argument is confused conceptually and groundless doctrinally. Its most basic defect, however, is that it is totally out of place: It goes to whether there is preemption, not to the existence of a cause of action to enforce the Supremacy Clause.

Conceptually, the contract argument has little to recommend it. "Conditional spending statutes are no less 'law' than any other kind of federal legislation." Samuel Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 391 (2008). The Supremacy Clause itself certainly contains no exception for laws enacted under the Spending Clause. Even though Spending Clause statutes impose obligations only on States that accept the conditional offer of funds, "that fact does not make their obligations any less binding (or any less a product of 'law') than the obligations imposed by any other federal statute." *Ibid.* This Court's jurisprudence has been entirely consistent with this principle. In particular, this Court has repeatedly held that Spending Clause statutes preempt inconsistent state legislation. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 138 (1982); *Carleson* v.

Remillard, 406 U.S. 598, 604 (1972). That is precisely what petitioners claim cannot happen. Pet Br. 47-48.

Moreover, while petitioners style this argument as a question of whether the preemption cause of action is available with respect to Spending Clause statutes, really their argument is that Spending Clause statutes are not preemptive. Indeed, petitioners give the game away right off the bat by arguing that "[p]rinciples of supremacy, *and of preemption generally*, have no application to allegations that a state has failed to satisfy a federal funding condition." Pet. Br. 46 (emphasis added); see also U.S. Br. 21 (claiming that respondents use the term preemption "in a rather special sense" (internal quotation marks omitted)). Whether or not preemption principles suggest that Spending Clause statutes should be treated differently is simply a question of the substantive law of preemption, to be resolved on the merits. In other words, petitioners' argument goes to the existence and extent of an actual conflict between federal and state law sufficient to trigger preemption. But the Supremacy Clause cause of action does not leap in and out of existence depending on whether the preemption claim is ultimately successful—the existence of a cause of action is logically antecedent to and conceptually distinct from the merits. Nor does the cause of action switch on and off depending on the Constitutional provision under which the relevant federal statute was enacted. If a statute is not preemptive, the courts can and will make that determination (by contrast, in this case, courts have definitively ruled that the relevant state and federal laws *do* stand in conflict). There is no reason to

anticipate that scenario by creating carve-outs in the Supremacy Clause cause of action.

Notably, this was precisely the approach taken by seven Members of the Court in *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003). Although seven Justices split 4-3 over the question of whether the Medicaid Act preempted Maine's rebate program, *id.* at 661-668, 669-74, 682-90, all seven recognized that this was properly a preemption issue—none questioned the availability of the private cause of action. There is no reason for the Court to adopt any other approach to this case.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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